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IN THE SUPREME COURT OF
THE UNITED STATES

1980 OCTOBER TERM

JAMES MARTORANO

V.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR CERTIORARI

RICHARD M. EGBERT, ESQUIRE
MARCUS & EGBERT
143 NEWBURY STREET
BOSTON, MASSACHUSETTS
02116
(617) 261-5383

ROBERT S. SINSHEIMER, ESQUIRE
OF COUNSEL

QUESTIONS PRESENTED

1) Does the Sixth Amendment right to effective assistance of counsel require reversal where a Federal District Court fails to perform a pre-existing duty to inquire into a defendant's cognizance of the dangers of joint representation by counsel?

2) Assuming the Constitution does not automatically require reversal where a Federal District Court fails to perform a pre-existing duty to inquire, into a defendant's cognizance of the dangers of joint representation, shouldn't reversal be required if the record does not reflect a knowing and intelligent waiver of a Sixth Amendment right to separate individual representation by counsel?

3) Is the in banc review procedure available to a Circuit that has only three active judges and, if so, may such review be exercised simply by substituting one judge's interpretation of the facts for another?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner James Martorano prays that a Writ of Certiotari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the case of United States v. Martorano, decided on May 12, 1980.

CITATIONS TO OPINIONS BELOW

The first opinion of the Court of Appeals in banc is as yet unprinted and is attached to this petition, (Appendix "A"), No. 78-1445 (1st Cir. May 12, 1980). On June 9, 1980, the court denied petitioner's Motion for a Re-hearing In Banc, (Appendix "B"). An earlier opinion of the three judge Court of Appeals is printed at 610 F.2d 36 (1980). The DIstrict Court Judgment denying petitioner's Motion for a New Trial may be found at 457 F. Supp. 803 (D.C. Mass. 1978).

Citation for the decision upholding the original judgment of conviction is U.S. v.

Martorano, 557 F.2d 1 (1st Cir.) Reh. Den. No. 76-1372 (1st Cir. May 23, 1977) unpub. See also 561 F.2d 406 (1st Cir. 1977) Cert. Den. 435 U.S. 422 (1978).

JURISDICTION

The indictment against petitioner was brought under 18 U.S.C. §891-896. That act is a commerce clause formulation and thus the Federal Courts have jurisdiction under both 28 U.S.C. §1337 and 28 U.S.C. §1331. This court has jurisdiction pursuant to 28 U.S.C. §1254, to review the judgment of the First Circuit Court of Appeals entered on May 12, 1980. Petitioner's Motion to rehear was denied on June 9, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Constitutional Amendment 6:

See Appendix "C".

2. 28 U.S.C. 646(b):

See Appendix "C".

3. 18 U.S.C. §891-896:

See Appendix "C".

STATEMENT

Petitioner James Martorano, along with one Edward Brian Halloran, was indicted and charged with two conspiracies to violate, and two substantive violations of the Consumer Credit Protection Act. 18 U.S.C. §891-896. Both men were tried together. At trial, Halloran was represented by Attorney Martin Weinberg and petitioner was represented by Attorney Joseph Oteri; partners in a law firm bearing their names; Oteri and Weinberg. Although Halloran was acquitted of all charges, petitioner was convicted and sentenced to a lengthy jail term. Using the same counsel, petitioner exhausted his direct appeal, questioning rulings of evidence by the trial court.

Then with the aid of new counsel, petitioner moved for a new trial on the grounds that the

joint representation of he and Halloran by attorneys of the same firm violated his Sixth Amendment right to the effective assistance of counsel. The principle legal claim was that Judge Caffrey, who presided over the first trial, failed to properly inquire about petitioner's awareness of the dangers of joint representation as required by U.S. v. Foster, 469 F.2d 1 (1st Cir. 1972). Because Judge Caffrey's own conduct was called into question, petitioner tendered a Motion to Recuse pursuant to 28 U.S.C. §455 (a). Said Motion was denied.

Subsequently, Judge Caffrey held a hearing on petitioner's Motion for a New Trial. At the hearing, testimony established the following:

> The magistrate who arraigned Halloran was aware of the possible Sixth Amendment violation, and requested that Halloran file a statement indicating recognition of the problem and acceptance of the situation. Two days later, petitioner was asked to come to the offices of Oteri and Weinberg. There, Attorney Weinberg, counsel

for Halloran asked petitioner to sign two letters. The first letter was addressed to Magistrate Davis. The second letter was addressed to petitioner Martorano himself, and purported to be from Attorney Oteri. Mr. Oteri, petitioners counsel, was not present in the offices at this time. In fact, both letters were authored by Attorney Weinberg, who when questioned about them by petitioner, stated "it is merely to satisfy the Magistrate that there is no conflict of interest". Petitioner Martorano then signed the letter addressed to him without fully reading it. The letter was subsequently filed with the Magistrate.

Mr. Oteri testified that he had never discussed the contents of the letter with the petitioner nor was petitioner informed of any of the risks of joint representation. Mr. Weinberg advised Martorano that no conflict of interest existed, and never

reviewed the contents of the letters he had presented to Martorano nor otherwise advised the petitioner of any dangers of joint representation. At no time did either the Magistrate or the trial court conduct any inquiry of Martorano or explain to him the specific dangers of joint representation.

Martorano testified at the new trial hearing that he had no intention of taking the stand at trial; rather he expected rebuttal of the government's case through the testimony of Louis Pallotta, brother of Peter Pallotta, the governments chief witness. Peter testified that petitioner made an extortionate loan to him. However, Louis who was present at the alleged loan transaction, would have testified that any loans made by petitioner were made to him (Louis) on behalf of his brother and were interest free between friends. Louis Pallotta had been

available during trial as a defense witness, but, counsel informed Martorano, after the government rested, of an alleged prior inconsistent statement by Louis. Martorano further testified that both attorneys advised him that Louis Pallotta could present evidence of Halloran's character that would be detrimental to Halloran. Louis was not called as a witness.

Prior to the decision over whether or not to call Louis Pallotta as a witness, certain tape recordings, tending to incriminate petitioner had been admitted into evidence. However, counsel succeeded in suppressing similar recordings which may have tended to incriminate Halloran. Thus, at the time the decision not to call Louis Pallotta was made, petitioner and Halloran stood in very different positions before the jury. Almost no evidence incriminating Halloran had been admitted, and it was to his benefit to have the trial draw

quickly to a close. But, petitioner was in a position where exculpatory evidence was needed, the absence of which led to his conviction. However, counsel both testified that they had adopted a trial strategy designed to ensure Halloran's acquittal, in which event, they had believed, Martorano would also be acquitted.

Mr. Oteri and Mr. Weinberg therefore insisted that Martorano testify, although Martorano vehemently disagreed with that decision. When Martorano testified, Mr. Oteri mentioned on direct examination petitioner's two prior convictions, with which convictions Martorano was directly confronted on cross-examination by the government. Martorano's testimony was exculpatory of Halloran.

Petitioner, who stated that he had been advised that Halloran would be testifying to exonerate him, was informed at some point after his testimony that counsel did not then wish to call

Halloran to the stand. Had Halloran testified, his testimony, according to Mr. Weinberg, would have been exculpatory of Martorano.

On September 20, 1978, the trial court issued an order and opinion denying petitioner's Motion for a New Trial. U.S. v. Martorano, 457 F.Supp. 803, 810 (D. Mass. 1978).

Petitioner then appealed to the First Circuit Court of Appeals. Judge Pettine of the Rhode Island District Court, sat by special designation. In an opinion drafted by Judge Bownes, with Judge Pettine concurring, the court held that the petitioner's constitutional rights were violated by the trial courts failure to inquire into the defendant's understanding of the dangers of joint representation. The court also held that because the potential for conflict of interest existed over the decision whether or not to call Louis Pallotta plainly constituted an alternative strategy for defense counsel, a new trial was required and ordered. Judge Coffin dissented.

The government then moved for a rehearing and suggested a rehearing in banc. Because Judge Pettine had been sitting by special designation, he was replaced by Judge Campbell. With Judge Campbell and Judge Coffin now in the majority, the court completely reversed itself and upheld the District Court's denial of petitioner's Motion for a New Trial over Judge Bownes' vigorous dissent.

Martorano now petitions this court for a Writ of Certiorari so that the court may redress the grievous Sixth Amendment violations which occurred below, and so that the court may clarify the rules, regarding rehearings in banc.

ARGUMENT

I. ONCE A FEDERAL TRIAL COURT HAS A DUTY TO INQUIRE OF THE EXTENT OF A DEFENDANTS AWARENESS OF THE DANGERS OF JOINT REPRESENTATION BY COUNSEL, FAILURE TO PERFORM SUCH A DUTY CONSTITUTIONALLY REQUIRES REVERSAL.

In Cuyler v. Sullivan, 48 L.W. 4517 (1978) this court held that where a trial court has a pre-existing duty of inquiry into a defendant's awareness of the dangers of joint representation, failure to conduct such an inquiry creates a presumption that a conflict of interest exists, and reversal is required. The Cuyler court nonetheless upheld the conviction of an alleged criminal in Pennsylvania State Court despite the trial judge's failure to warn the defendant of the dangers of joint representation by counsel. But the basis for the courts decision was that "nothing in the circumstances of that case indicated that the trial court had a duty to inquire whether there was a conflict of interest". Cuyler, supra,at 4521. The clear implication is that if circumstances were otherwise and indeed, the trial judge

had been under a duty to inquire, the result would have also been otherwise. Petitioner Martorano requests this Court to further clarify its position and firmly hold that a trial court's abrogation of a pre-existing duty to inquire into the dangers of joint representation is constitutional error requiring reversal.

In the case at bar, the trial court had an absolute duty to inquire pursuant to the decision of the First Circuit in U.S. v. Foster:

> "it shall be the duty of the trial court, as early in the litigation as practicable to comment on some of the risks confronted where defendants are jointly represented to insure that the defendants are aware of such risks with their attorney's and whether they have discussed the risks with their attorneys' and whether or not they understand that they may retain separate counsel or if qualified may have such counsel appointed by the court

and paid for by the government" 469 U.S.1,5 (1st Cir. 1972).

Unlike the case in Cuyler, supra, this duty existed at the time of Martorano's trial. No one disputes the fact that an inquiry was not made and thus, the trial court's constitutional duty was unfulfilled.

Had the duty arisen by virtue of the defendant's or counsel's objections, there is no doubt that reversal would be required. Holloway v. Arkansas, 435 U.S. 475 (1979). But, where the constitutional duty is one of inquiry, there should be no difference between the objection of counsel, and a prior opinion of the Circuit Court of Appeals. In both cases, the issue is whether the trial court had notice of potential conflicts of interest. In both cases, notice is apparent.

In the Holloway situation, where a defendant himself objects to the joint representation, a court has expressly been placed on notice of the potential for conflicts of interest.

Where the notice arises from a prior court opinion, it is of a more constructive nature. Still, the legal effect is indistinguishable. But, even, if a distinction could be drawn, we ask the court nonetheless to hear petitioner Martorano's claim in order to clarify its view of when the duty to inquire is of constitutional dimension and when it is not. The Cuyler decision alone is not decisive for Cuyler merely holds that no reversal is required where no duty at all exists. Petitioner Martorano now asks the court to take his case, and to hold that where a situation unlike Cuyler exists and a duty to inquire is clearly present, the Sixth Amendment will not allow it to be lightly shunted aside.

A. In Federal Court, the duty to inquire of the defendant's knowledge of the dangers of joint representation should be constitutionally mandated.

The court in Cuyler held that the

constitution does not require state trial court judges to engage in an on the record colloquy to determine the propriety of multiple representation. However, the court in a footnote hinted that the constitution may require a stricter rule for the Federal DIstrict Courts. Cuyler v. Sullivan, supra, at 4520, N.10. Today, petitioner Martorano asks the court to review a case which will allow it to render an opinion elevating a confusing footnote to a well explained rule of law, thereby curing a split between the circuits. Compare U.S. v. Mavrik, 601 F.2d 921, 929 (7th Cir. 1979) with Colon v. Fogg, 603 F.2d 403, 407 (2nd Cir. 1979). We ask the court to rule that the federal trial courts are under a constitutional duty to inquire as to a defendant's understanding of the perils of joint representation. If the court does render such a ruling, reversal would be required because the court in Cuyler reaffirmed the principle of Glasser v. United States,

315 U.S. 60 (1942) setting forth the rule that unconstitutional multiple representation is never harmless error. Cuyler v. Sullivan, 48 L.W. 4517.

A ruling that federal judges are constitutionally required to inquire into the dangers of joint representation would not be inconsistent with Cuyler's holding that state court judges are not required to engage in such inquiry. The Cuyler rule makes sense, given the importance of federalism in our judicial system. See, e.g. National League of Cities v. Usury, 426 U.S. 833 (1976). Younger v. Harris, 401 U.S. 97 (1971). That the Bill of Rights, including the Sixth Amendment, requires more safeguards of the federal courts than of the state courts is, since Palko v. Connecticut, 302 U.S. 319 (1937), uncontrovertable. See also Gideon v. Wainright, 372 U.S. 338, 352, (1963), Clark, J. concurring. Johnson v. Louisiana, 406 U.S. 356, 369-375 (1972) Powell J. concurring. "There is no sound basis for

interpreting the Fourteenth Amendment to require blind adherence by the states to all details of the Federal Sixth Amendment Standards". Johnson v. Louisiana, supra, at 375. Thus, a case holding that a certain procedural rule is not applicable to the states, does not bar a holding constitutionalizing the rule in the federal courts.

Indeed, the Cuyler opinion itself notes that an on the record inquiry is generally "desirable" and consistent with the courts own promulgation of proposed Fed.R.Crim.P.44 (c). Cuyler, supra, at 4520 N.10. The tone of the courts discussion in footnote 10 of Cuyler suggests that the court has already determined that an on the record inquiry is constitutionally mandated in Federal Courts. A hearing of petitioner's claim would allow the court to clarify that position.

We ask the court to view petitioner's participation in a trial represented jointly with a co-defendant as a question of waiver of

his right to separate representation. Holloway v. Arkansas, supra, established the principle that the Sixth Amendment provides not just a right to counsel but to separate counsel unbridled by potential conflicts of interest. By also holding that "joint representation is not a per se violation of the constitutional guarantee of effective assistance of counsel", Holloway left room for defendants to waive their right to separate representation.

But lest the joint representation be unconstitutional, the waiver, as all waivers of the Sixth Amendment rights must be made "knowingly and intelligently". Johnson v. Zerbst, 304 U.S. 458 (1938). Defendant may waive his right to counsel if he "knows what he is doing and the choice is made with his eyes open". Adams v. U.S. ex. rel. McCann, 317 U.S. 269, (1942). And, it is clear that such a waiver must be made on the record. Faretta v. California, 422 U.S. 806, 835 (1975).

As a practical matter, the record can only establish the validity of a waiver, if the trial court initiates an inquiry into

the defendants understanding of the issues involved. Colon v. Fagg, supra,. The Appeals Court in the instant case agrees. The "immediate purpose" of the inquiry is to "prevent the uncertainly that arises when defendants make post-conviction claims of ingorance or misadvice". U.S. v. Martorano, No. 78-1445, 3, N.3 (1st Cir. May 12, 1980). Because the Constitution demands virtual certainty in the ascertainment of a waiver, the rule requiring on the record inquiry itself acquires constitutional dimension. See Cuyler v. Sullivan, supra, N.10; Colon v. Fagg, supra, at 407, U.S. v. Lawriw, 568 F.2d 98 (8th Cir. 1977). It is more than just an exercise of supervisory power by the First Circuit. And, because violation of a Sixth Amendment right is "never harmless error", Chapman v. California, 386 U.S. 18 (1967), the court's failure to inquire in the instant case warrants this court granting petitioner Martorano a new tiral.

II. ASSUMING THAT FAILURE TO INQUIRE IS NOT PER SE, REVERSABLE ERROR, THIS COURT SHOULD STILL HEAR PETITIONER'S CASE TO PROVIDE A SET OF CLEAR STANDARDS FOR THE LOWER COURTS TO DETERMINE WHEN FAILURE TO INQUIRE WARRANTS REVERSAL.

Petitioner remains resolute in his contention that the constitutional error by Judge Caffrey at trial in failing to warn petitioner of the dangers of joint representation requires a reversal and a new trial. But even if a reversal is not automatically required, this court should still hear petitioner's case, in order to constitutionalize the standards for determining just when reversal is warranted.

In parts A) and B) of this section, we offer to the court two different standards that may possibly be established; the "waiver" standard or the "shifting burden". Although "waiver" is preferable, no matter which is used, petitioner should be granted a reversal on the facts of the instant case.

A. It is preferable for this court to require the government to establish that the defendant knowingly and intelligently waived his right to separate representation.

We ask the court today to rule that where a defendant agrees to go to trial represented by counsel jointly with a co-defendant, the record must clearly establish that he waived his right to separate representation unbridled by conflicts of interest. See Holloway v. Arkansas, supra. Here petitioner asks no more than that the waiver of petitioner's right to separate representation be held consistent with all Sixth Amendment waivers. Generally, a waiver of the Sixth Amendment right to counsel must be made, on the record. Faretta v. California, supra, "Courts must indulge in every reasonable presumption against waiver". Brewer v. Williams, 430 U.S. 387, 404 (1977).

Petitioner recognizes that Faretta falls short of requiring the record colloquy by the court he believes is constitutionally necessary. But, the record must still firmly establish that a waiver was made "knowingly and intelligently" and with ones "eyes open". Johnson v. Zerbst, supra; Adams v. U.S. ex. rel. McCann, supra.

Because no record inquiry into petitioner's understanding of the dangers of joint representation was made by the trial court, the only evidence tending to establish that petitioner waived his right to separate representation is the letter he signed in the offices of Oteri and Weinberg. Yet, the evidence at his Motion for a New Trial indicated that petitioner signed only because he was informed by counsel that the matter was a technicality. Clearly, as the First Circuit Court of Appeals noted in its panel opinion, the letter "does not constitute strong evidence that he understood the dangers involved". U.S. v. Martorano, 610 F.2d at 44

Petitioner had already placed his faith and trust, in the same counsel who now told him that joint representation was not a problem. A mere recitation to the contrary by counsel cannot cause petitioner to have "knowingly and intelligently" waived his valuable constitutional rights.

When the First Circuit in banc reversed the panel opinion, it never once mentioned the word "waiver". It did hold however that "letters prepared and signed outside the courts purview are not a substitute for the in court colloquy mandated by Foster... A mandate whose ultimate aim is proper warning". U.S. v. Martorano, No. 78-1445 (1st Cir. in banc, May 12, 1980). The phrase "proper warning" apparently is shorthand for the courts acknowledgement that if a defendant is to proceed with joint representation he must do so "knowingly and intelligently". But, by failure to acknowledge the applicability of "waiver" principles, the court thereby avoided confrontation with the Faretta, Adams, and Johnson line of cases that mandate reversal.

The first Circuit's failure to view petitioner's joint representation as a waiver of his rights to separate representation perhaps results from this Court never having carefully enunciated separate representation as a constitutional right. But, Holloway v.

Arkansas, supra, establishes without a doubt that the right to separate representation is indeed constitutional in magnitude, at least where a potential conflict exists. As soon as a defendant objects to joint representation, he is entitled to separate counsel, or reversal is "automatic". Holloway, supra, 435 U.S. at 488. This language has convinced several of the circuits that separate representation is indeed a constitutional right which must be waived if joint representation is to be deemed constitutional. See, e.g. Colon v. Fagg, 603 F.2d 403, 407 (2nd Cir. 1979)(defendant must make informed waiver of his right to independant representation). U.S. v. Lawriw, 568 F.2d 98, 105 (8th Cir. 1977)(right to separate independant counsel).

Thus, we ask this court to take the cue from Colon, supra, and Lawriw, supra, and expressly label separate representation as a constitutional right. Once the status of the right is made clear, it will be equally clear that due process requires reversal because petitioner never "knowingly and intelligently"

waived the right. U.S. v. Martorano, 610 F.2d 36 (1st Cir. 1980) rev'ed No. 78-1445 (1st Cir. in banc May 12, 1980).

B). If the court does not hold separate representation to be a constitutional right, the court should still rule that failure to inquire shifts to the government the burden of proving that the joint representation involved no prejudice because no alternative defense strategy existed.

Many courts have held that trial court's failure to inform the defendant of the dangers of joint representation saddles the government with the burden of proving a lack of conflict. U.S. v. Foster, 469 F.2d 1 (1st Cir. 1972); Colon v. Fogg, 603 F.2d 403 (2nd Cir. 1979); U.S. v. Lawriw, 568 F.2d 98 (8th Cir. 1977). See also Cuyler v. Sullivan, supra,at 4522, Brennen, J. concurring. And, the "shifting burden" standard is the one purportedly used by the Appeals Court in the present case. U.S. v. Martorano, No.78-1445

P.4 (1st Cir. May 12, 1980). However, an examination of the procedural posture of this case will indicate just how futile use of the "shifting burden" standard is in this context. When petitioner's Motion for a New Trial was first heard, on appeal, a three judge court held that the trial court's failure to inquire of defendant's understanding of the dangers of joint representation shifted to the government the burden of proving that no prejudice in fact occurred. Because the government could not prove the absence of an alternative defense strategy which independant counsel might have chosen, a new trial was warranted. U.S. v. Martorano, 610 F.2d 36 (1st Cir. 1979). Upon rehearing, a similar three judge panel felt that the government had met its burden. U.S. v. Martorano, No. 78-1445 (1st Cir. in banc May 12, 1980). Such a reversal could occur only because the "shifting burden" standard cannot clearly be applied in this context.

Indeed, the standard is often confused with the aforementioned preferable waiver standard. See, e.g. Colon v. Fogg, supra; U.S. v. Lawriw, supra. However, if the waiver standard were clearly enunciated by this Court, lower courts would have a long line of waiver cases from which to draw guidance.

Instead, examination of the holdings of the various circuits indicates an enormous degree of confusion. In U.S. v. Lawriw, supra, the court held that "only a minimal showing of conflict should be required to involve constitutional protection", 568 F.2d at 602. In Colon v. Fogg, supra, the court purportedly shifted the burden to the government, but then analyzed the case in terms of the petitioner's proof. 603 F.2d at 407 (1979). The court implied that the petitioner must show that "joint counsel was placed in the dilemma of having either to pursue or abandon a defense or tactic that would help one defendant but hurt the other". Colon v. Fogg, supra, at 407 quoting Smith v. Regan, 583 F.2d 72, 77 (2nd

Cir. 1978). In Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965) the court held that reversal is required if "the defendant is clearly prejudiced". In United States ex.rel. Hart and Davenport, the court held that "the possibility of conflict, however remote", warranted reversal. 478 F.2d 203, 210 (1973). Finally we reiterate that there are still some circuits that unconstitutionally place no duty to inquire on the trial judge at all, and therefore have not even addressed the question of which standard of review to apply if the duty is not exercised. See, e.g. U.S. v. Mavrik, 601 F.2d 921, 929 (7th Cir. 1979).

Thus, certiotari should be granted even if this court believes that the "shifting burden" standard purportedly used below, is the correct one. For even if the standard is indeed proper, the lower courts have been grossly inconsistent in its application. We suggest that the proper application for the shifting burden standard must be that the

government must prove that no alternative defense stragety existed. See U.S. v. Donahue, 560 F.2d 1039 (1st Cir. 1977).

Applying the above to the facts of petitioners case, it becomes apparent that even if the "shifting burden" standard is properly used, reversal is necessary. See U.S. v. Martorano, 610 F.2d 36 (1st Cir. 1979).

At the hearing on the Motion for a New Trial, petitioner introduced evidence establishing that Louis Pallotta, brother of the state's "star" witness would have testified on petitioner's behalf. Louis Pallotta would have stated that any loans made by petitioner were made interest free to him (Louis) on behalf of his brother Peter, because he (Louis) and petitioner were close friends. Such evidence clearly tends to exculpate petitioner. Yet Louis was not called, primarily because counsel feared that Louis' testimony might prove damaging to Halloran.

Nonetheless, the Court of Appeals held

that the government met its burden of proving that petitioner was not prejudiced by joint representation despite his attorney's failure to call Louis Pallotta. In justifying its holding, the court noted that Louis Pallotta had allegedly made prior inconsistent statements damaging to petitioner. Yet, as the Court of Appeals noted in its first opinion, "it is possible that Louis lied to the F.B.I. on impulse to protect his brother (who had already agreed to 'co-operate' with the F.B.I. in building a case against appellant) but then later decided to tell the truth even though he would be contradicting his brother by doing so". U.S. v. Martorano, 610 F.2d 36, 44 (1st Cir. 1980). In any event, the substance of Louis Pallotta's allegedly damaging statements was never placed in evidence at the hearing on the Motion for a New Trial. Thus, the Appeals Court panel was correct when it noted that it had "no reason to doubt that calling him (Louis) would have been an acceptable risk". 610 F.2d at 44. Whether

or not allegedly contradictory statements could truly harm Martorano, or damage Louis' own credibility is, even as the Appeals Court in banc acknowledges, total and absolute speculation. Note the following language.

> "The problem with Louis as a potential witness was that he had previously given a contradictory statement to the F.B.I. (which depending on its contents might have gone some distance to destroy Martoranos as well as Louis' own credibility" U.S. v. Martorano, No. 78-1445 P. 6 (1st Cir. in banc May 12, 1980) (emphasis added)

Although the court labelled the alleged statement contradictory, in fact, the court has absolutely no knowledge of its contents.

Thus, the Appeals Court opinion violates the reasoning of its own rule set out just two years prior in U.S. v. Donahue;

> "where an alternative strategy whatever its ultimate merit, plainly existed, and where such strategy involved, as between the joint defendants, some potential

for conflict we cannot say for sure that the potential conflict did not influence the choices made by those representing both defendants." 560 F.2d 1039, 1045 (1st Cir. 1977)

Petitioner submits that, absent establishment of a per se reversal requirement, this court should adopt the above formulation in Donahue, as its own. And, applying such formulation to the facts of the case, the court should reverse the First Circuit Court of Appeals, and order a new trial. To do otherwise would result in upholding an opinion which violates this court's express prohibition against engaging in "nice calculations as to the amount of prejudice" where joint representation is questionable. Glasser v. U.S., 315 60, 77 (1942).

III. THE COURT SHOULD HEAR PETITIONER'S CASE TO CLARIFY RULES REGARDING THE USE OF IN BANC REHEARINGS IN THE FEDERAL APPEALS COURT.

It is obvious from a reading of the Circuit Court opinion, that the judges of the First

Circuit Court of Appeals do not agree upon the meaning of F.R.A.P. 35(a). See United States v. Martorano, No. 78-1445 P.17 (1st Cir. May 12, 1980, Bownes, J. dissenting). Neither do the judges of the Second Circuit. See Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2nd Cir. 1972). Furthermore, the majorities in the two circuits view the rule oppositely, causing not only internal splits, but a split between the circuits themselves. See United Stated v. Martorano, supra, at P.14. Because the Rules of Appellate Procedure were promulgated by this court to ensure efficiency and uniformity among the Circuits, it is incumbant upon this Court to hear petitioner's case, thereby curing the uncertainty and division now prevalent over the interpretation of Appellate Rule 35.

Upon hearing the case, this court should rule that the in banc rehearing procedure may not be used, simply to substitute the wisdom of one individual for another. See United States v. Marotrano, supra, No. 78-1445, Bownes, J. dissenting. The facts of this case

establish that such a misuse of the in banc rehearing procedure manifests gross injustice.

On December 6, 1979, petitioner was awarded a new trial, by a three judge panel of the First Circuit Court of Appeals. Judge Pettine of the Rhode Island District Court sat on the panel by designation. In an opinion by Judge Bownes, the court found petitioners claim of denial of the Sixth Amendment right to effective assistance of counsel to be meritorious. Although not adopting the per se reversal rule that we initially urge upon this court today, the panel held that the original trial courts failure to inform petitioner of the dangers of joint representation placed the burden upon the government to prove that no conflict of interest existed. The panel held that the government could not meet its burden, where an alternative strategy such as the calling of Louis Pallotta as a witness was available to petitioner's counsel. U.S. v. Martorano,

610 F.2d 36 (1st Cir. 1979). The opinion was thus consistent with the First Circuits own holding in U.S. v. Donahue, supra.

Five months later, that decision was overturned by the same court purporting to be sitting in banc. But, the only difference in the composition of the court was that Judge Campbell replaced Judge Pettine. No change in the law was made, nor was any new substantial question raised. "All that the in banc hearing produced was a different result". United States v.Martorano, No. 78-1445 P.17 (1st Cir. May 12, 1980, Bownes, J. dissenting). The court, used the exact same "shifting burden" standard used by the panel court. Compare U.S. v. Martorano, No. 78-1445 P.4 (1st Cir. in banc May 12, 1980) with U.S. v. Martorano, 610 F.2d 36, 41-43 (1st Cir. 1980). As Judge Bownes correctly noted this is in stark contravention of F.R.A.P. 35 (a) which allows for in banc hearings only where "consideration of the full court is necessary to secure or maintain uniformity".

Furthermore, had this case been filed in the Second Circuit, the Second Circuit Court of Appeals interpretation of F.R.A.P. 35(a) would have prevented the government from securing a rehearing in the first place. See Zahn v. International Paper Co., supra, There, the court held that four members of a court having eight active members do not establish the requisite majority to grant a rehearing in banc. Here, where only two members of a four member court voted to rehear the case, a rehearing should have been denied. Such a denial would be consistent with the view promulgated by this Court in Western Pacific Railroad Co. v. Western Pacific Railroad Corp., 345 U.S. 247, 261, that an in banc rehearing should be held only when a majority of the full membership of the bench so votes. And, if rehearing had been denied the panel opinion would have remained in force, and petitioner Martorano would have had the new trial that is constitutionally required to correct the Sixth Amendment violations which have prejudiced him and denied him

due process of law.

Beyond the procedural technicality of what constitutes a majority, lies the more substantive question of whether or not one three judge panel may constitutionally overturn another.

"Cases and controversied shall be heard and determined by a court of not more than three judges, UNLESS a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the Circuit who are in regular active service" 28 U.S.C. 46(b)(emphasis added).

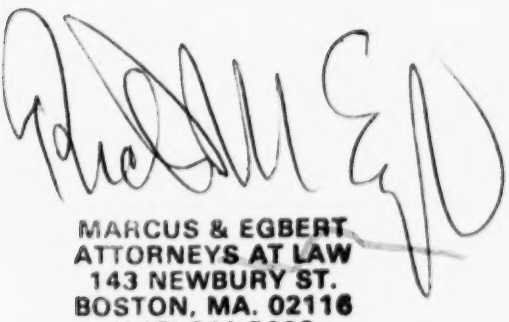
A fair interpretation of the statute indicates that an in banc rehearing is available only if the second hearing would be heard by more than three judges. Once one three judge panel has heard the case, its judgment is res judicata unless a larger panel is convened to "secure or maintain uniformity; in the circuit F.R.A.P. 35(a).

"It is essential that a Circuit Court and the litigants who appear before it, under-

stand the practice, whatever it may be whereby the court convenes itself in banc." Western Pacific Railroad Corp., supra, at 261. Prior to the decision of the Appeals COurt in the case at bar, no one understood the in banc enablement was capable of allowing a court to substitute one interpretation of the facts for another, especially where absolutely no change of legal standards is developed or even contemplated and the only difference in the opinions is how one judge views the application of the facts to the law. See U.S. v. Martorano, No. 78-1445 P. 17 (1st Cir. in banc May 12, 1980, Bownes, J. dissenting). Because such a procedure is obviously unjust, and because the Federal Appellate Courts are clearly split and confused in their understanding of the use of in banc rehearings, petitioner's Writ of Certiorari should be granted.

CONCLUSION

For all of the above reasons, petitioner, James Martorano respectfully requests this Court to grant a Writ of Certiotari to the First Circuit Court of Appeals.



MARCUS & EGBERT
ATTORNEYS AT LAW
143 NEWBURY ST.
BOSTON, MA. 02116
(617) 261-5383

United States Court of Appeals
For the First Circuit

No. 78-1445

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES MARTORANO,

DEFENDANT, APPELLANT.

ON PETITION FOR REHEARING EN BANC

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Richard J. Vita for appellant.
Wade Livingston, Attorney, United States Department of Justice, with whom *Edward F. Harrington*, United States Attorney, and *Joseph S. Davies*, Attorney, United States Department of Justice, were on brief, for appellee.

May 12, 1980

CAMPBELL, *Circuit Judge*. James Martorano appeals from the judgment of the district court, 457 F. Supp. 803 (D. Mass. 1978), denying his motion for new trial on the ground of ineffective assistance of counsel due to joint representation.[1] His appeal was originally decided by a panel

[1] Martorano moved for a new trial on the ground of "newly discovered evidence" more than seven days after the verdict, *see* Fed. R. Crim. P. 33, contending he had not previously learned of the prejudice joint representation allegedly caused him. The district court ruled that ineffective assistance of counsel could not constitute newly discovered evidence for purposes of Rule 33, and treated Martorano's motion instead as one to vacate his sentence under 28 U.S.C. § 2255. As the question whether this case comes to us on direct or collateral appeal would not affect the outcome, *see* text at page 4 *infra*, we express no opinion on the district court's ruling.

of this court, which reversed and remanded for a new trial after holding the government had not demonstrated that Martorano was not prejudiced by the failure of the trial court to conduct the inquiry required in *United States* v. *Foster,* 469 F.2d 1, 5 (1st Cir. 1972). Appellee then moved for rehearing en banc, and that motion having been allowed by vote of a majority of this court, the panel's judgment was vacated and an en banc hearing held, resulting in the present opinion. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a); Part IV *infra.*

The facts are more fully set forth in the panel opinion, to which we shall refer, *United States* v. *Martorano,* 610 F.2d 36 (1st Cir. 1979). *See also United States* v. *Martorano,* 557 F.2d 1 (1st Cir.), *reh. denied,* No. 76-1372 (1st Cir. May 23, 1977) (unpub.) and 561 F.2d 406 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978) (affirming appellant's conviction on direct appeal). In the present opinion, we repeat the facts only as necessary to our analysis of the issues.

I.

Our decision in *United States* v. *Foster,* 469 F.2d 1 (1st Cir. 1972), requires the district courts of this circuit to warn on the record every defendant who indicates that he contemplates being jointly represented at trial of the risks inherent in such representation, so that the court can be assured that his waiver of the right to separate counsel is knowing and voluntary. 469 F.2d at 5. In the present case, appellant Martorano received no direct warning by the court, although in response to instructions from the magistrate, his attorneys provided certain advice orally and in writing, and secured Martorano's signature to a letter to the court, which they had prepared, stating that he was aware of the risks of joint representation but nonetheless wished to retain the same law firm which represented his

co-defendant Brian Halloran.[2] We agree with the panel opinion that this letter, and any advice preceding it, did not relieve the government from the consequences of the district court's failure to comply materially (or indeed at all) with the *Foster* rule. We made no provision in *Foster* for an alternative to direct inquiry in open court, and are not inclined to establish one now. Letters prepared and signed outside the court's purview are not a substitute for the in-court colloquy mandated by *Foster*.[3]

II.

We thus turn to the principal issue in this case and the one upon which our decision to grant rehearing en banc

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[2] Evidence developed at the new trial hearing established that this letter, along with another purporting to be from Joseph S. Oteri to his client Martorano warning in general terms of the risks of joint representation, was prepared by Martin Weinberg, attorney of record for Brian Halloran and Oteri's law partner. *See* 610 F.2d at 40-41.

[3] The ultimate aim of the *Foster* rule—a proper warning—could, in theory, be attained by full and careful disclosure in an attorney's office or elsewhere, but the rule's more immediate purpose —to prevent the uncertainty that arises when defendants make post-conviction claims of ignorance or misadvice—would still be frustrated. Thus while in *United States* v. *Donahue,* 560 F.2d 1039, 1044 (1st Cir. 1977), we said that the giving of out-of-court advice was relevant to the ultimate question of whether a defendant was prejudiced by the district court's noncompliance with *Foster,* only a compelling showing of the most complete and effective out-of-court advice would ever suffice, by itself, to disprove prejudice in a case such as this. The showing made here fell short of that standard. Prejudice, therefore, must be ascertained here largely in terms of whether there was an actual conflict of interest which was likely to have subverted Martorano's defense. Still, in our overall assessment of the prejudice caused by the court's failure to give a *Foster* warning, we think it reasonable to take into account that Martorano, a college-educated man, was not totally lacking in some advance warning of the pitfalls of joint representation, nor was he pressured into accepting joint representation. *Cf. Donahue,* 560 F.2d at 1041-42 (attorneys hired at the insistence of older co-defendant for whose benefit defense strategy allegedly tailored).

was based.[4] In *Foster* we said that the failure of the trial court to make adequate inquiry would shift to the government the burden of proving the unlikelihood of any prejudice arising from joint representation. While we described the government's burden in somewhat different ways according to whether the issue arose on direct appeal or on collateral attack, 469 F.2d at 5, we did not mean to announce as between the two situations any significant difference in the ultimate burden of persuasion. Rather we merely recognized that in the case of a direct appeal an appellate court's focus would be perforce on the trial record alone. Where, as here, an evidentiary hearing has been held, whether in connection with a motion for new trial, a motion to vacate sentence, or the like, such a hearing may be a "useful supplement" to the trial record, *see United States* v. *Donahue,* 560 F.2d 1039, 1044 (1st Cir. 1977), providing further insight into the actuality of any conflict between the interests of various defendants and illuminating the degree to which the choice of trial strategy may have been influenced by conflicting concerns. Still the ultimate question is the same in either context, namely, whether the government has carried its burden of showing it is more likely than not that no prejudice stemmed from the joint representation. We have not adopted a rule of per se reversal, *compare Holloway* v. *Arkansas,* 435 U.S. 475, 489 (1978) (automatic reversal where defendant was compelled, over his objection, to accept joint representation), nor is our standard as stringent as the "harmless beyond a reasonable doubt" rule followed where errors of constitutional magnitude are present, *compare Chapman* v. *California,* 386 U.S. 18, 24 (1967). Here we are not dealing with a court's unconstitutional refusal to allow separate

[4] Appellant has raised a number of challenges to our authority to grant an en banc rehearing in this case. These points will be discussed in Part IV of this opinion.

representation, *see Holloway* v. *Arkansas,* 435 U.S. 475 (1978), but only with its failure to provide a defendant with an auxiliary procedure required by this circuit under our supervisory powers, which is aimed at making absolutely certain the defendant understands all the pitfalls of joint representation. While we assuredly do not encourage violations of our supervisory rule, *see United States* v. *Waldman,* 579 F.2d 649, 653 (1st Cir. 1978), there are undoubtedly situations in which such violations cause little or no material prejudice to defendants; we must take care not to provide a windfall to a defendant, who has been found guilty of a serious crime, simply because of some attenuated hypothesis of prejudice woven by counsel after conviction. Joint representation, after all, may sometimes be quite beneficial to a defendant and may at other times be of little consequence to the adequacy of a defendant's representation. *See Holloway* v. *Arkansas,* 435 U.S. 475, 482-83; *Glasser* v. *United States,* 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). To overturn a defendant's conviction for violation of a supervisory rule where it is more likely than not that conflicting interests did not hamper counsel's pursuit of a potentially effective defense would be both wasteful and pointless.

In finding prejudice, the panel opinion focused on the following language in *United States* v. *Donahue,* 560 F.2d 1039, 1045 (1st Cir. 1977):

> "Where, as here, an alternative strategy—whatever its ultimate merit—plainly existed, and where such a strategy involved, as between the joint defendants, some potential for conflict of interest, we cannot say for sure that the potential conflict did not influence the choices made by those representing both defendants."

In applying that language to the very different facts of the present case, the panel derived two key elements necessary to establish prejudice: (1) the existence of an alter-

native defense strategy, and (2) the potential for conflict of interest between the defendants. The panel then found that at least one alternative strategy plainly existed, namely having Louis "Bugsy" Pallotta, brother of the chief prosecution witness Peter Pallotta, testify on appellant's behalf. The panel also found a potential for conflict in that the decision not to use Louis Pallotta as a witness may have been influenced by the possibility that Louis would damage appellant's co-defendant Brian Halloran by giving testimony as to Halloran's reputation and character.

As for the first element, the panel may well be correct that calling Louis Pallotta to testify should be regarded as an existing alternative defense strategy even though the district court, for rather substantial reasons, found that Louis had overwhelming disabilities as a defense witness. It was represented that Louis Pallotta, the brother of the chief prosecution witness, would have testified that Peter Pallotta's account of the loan transaction was a fabrication. Peter Pallotta himself had testified that Louis was present when the allegedly extortionate loan was negotiated; Louis, it is asserted, would have corroborated Martorano's version of this event, confirming that the loan was made to Louis rather than to Peter and that it was paid back by Louis prior to the time of the alleged extortionate collection efforts. Louis' hoped-for testimony would thus, on its face, have been very favorable to Martorano. The problem with Louis as a potential witness was that he had previously given a contradictory statement to the FBI (which, depending on its contents, might have gone some distance to destroy Martorano's as well as Louis' own credibility). Louis also had a history of very serious mental problems. Under these circumstances, the district court felt Louis would have been worse than useless—and so, according to themselves, did the defense attorneys. On the other hand, after-the-fact reconstruction of what an attor-

ney might have done had he been completely free from any sense of divided loyalties is a difficult feat. It makes sense, therefore, to assume, at least for purposes of argument, that calling Louis to the stand was a conceivable alternative strategy, and then to proceed to the key issue —which is whether there was in fact any such conflict of interest between the two defendants as might have led separate attorneys to make a different choice in Martorano's case than in Halloran's case with regard to the question of calling Louis Pallotta to the stand.

The foregoing is, of course, the key question in any case where *Foster* warnings have been omitted. The mere existence of alternative strategies is not by itself demonstrative of prejudice so long as there was no inherent conflict between the considerations that weighed upon rejection or acceptance of the strategies in both defendants' cases.

Appellant contends that his attorneys balked at putting Louis Pallotta on the stand at least in part because Pallotta might have given testimony on cross-examination which would have blackened Halloran's reputation. Since the evidence against Halloran was relatively weak, it is argued, the attorneys were concerned to prevent any corroboration of Peter Pallotta's testimony identifying Halloran as a "loan shark" and "enforcer" and implicating him in the "holdup" of Pallotta's nightclub.[5] This concern for Hallo-

[5] We shall take for granted that Louis Pallotta would, in fact, have given reputation testimony adverse to Halloran, although the point is not entirely clear. Attorney Joseph Oteri testified that he was unaware of any such possibility. Attorney Martin Weinberg stated that he was aware of the "danger" this might take place, but could not recall having discussed this risk with Martorano. Martorano testified that Weinberg told him Louis Pallotta should not testify because of the possibility he would hurt Halloran on cross-examination. We will assume, for present purposes, that Louis would have given such testimony and that it would have been admissible pursuant to 18 U.S.C. §§ 892(c), 894(c). *See United States* v. *Bowdach*, 501 F.2d 220, 225-26 & n.7 (5th Cir. 1974), *cert. denied*, 420 U.S. 948 (1975).

ran, so the argument goes, made it impossible for counsel to give proper consideration to the value of calling Louis on behalf of Martorano, for whom Louis would be a valuable corroborative witness.

A central flaw in this argument is that to the extent Louis' testimony would have helped Martorano, it would also, in virtually equal measure, have helped Halloran —so that whatever considerations induced the attorneys not to call Louis cut across both clients' cases. This is so even though, as the dissent observes, Louis would not have testified "directly" about Halloran. *See* page 16 *infra*. If the jury had credited Louis' (and thus Martorano's) version of events, it would necessarily have rejected Peter Pallotta's contrary testimony and would have found that there had never been a $2,000 loan to Peter—indeed, that Peter had fabricated the entire episode. Not only would such a belief by the jury have led to acquittal for both defendants on those counts of the indictment directly concerned with the $2,000 loan (counts one to three), it would have so totally discredited Peter Pallotta as to undercut his remaining testimony regarding Halloran's alleged collection—at Martorano's direction—of interest payments at gunpoint (count four). In short, Louis Pallotta, if at all helpful to Martorano as a witness, would necessarily have helped Halloran, and to a degree far exceeding any detriment to Halloran from Louis' reputation testimony. By the same token, if Louis, having once taken the stand, was discredited as a witness, the consequences would have fallen at least as heavily on Martorano as on Halloran. Louis' expected testimony dealt primarily with transactions in which Martorano was a direct participant and about which Martorano himself testified. If Louis was shown to have made a prior contradictory statement to the FBI, or if on cross-examination he changed his testimony, or if he made a conspicuously poor impression, Martorano's own credibility as a witness would be in jeopardy.

Similarly, the danger that Louis would admit on cross-examination that he knew the reputation of Brian Halloran to be that of an "enforcer" for loan sharking activities did not represent a conflicting interest as between the two defendants. Martorano had no more interest in bringing out such testimony than Halloran did, for the evidence clearly showed that Halloran and Martorano were close associates, and that, if Peter Pallotta were to be believed, Halloran was a "collector" for Martorano. From the uncontradicted evidence at trial, it was apparent that Halloran and Martorano had often been seen together at Martorano's restaurant; that Halloran on occasion took telephone calls for Martorano; that Halloran and Martorano visited Peter Pallotta's nightclub together on October 30, 1974, the night before the alleged "holdup" of the club by Halloran and an unidentified associate; and that Martorano was sufficiently familiar with Halloran and Peter Pallotta to know that there was ill will between the two stemming from an incident that occurred in federal prison. Were the jury in doubt as to whether Martorano had made an extortionate loan to Peter Pallotta—as opposed to a friendly, no-interest loan to Louis—testimony from Louis himself, a defense witness, that a man to whom Martorano was this closely tied was a reputed "enforcer" of extortionate loans could have tipped the scales.

An attorney representing only the interests of James Martorano would plainly have considered it disadvantageous to his client to have such testimony admitted unless he was persuaded that somehow, notwithstanding all the problems, those parts of Louis' testimony corroborating Martorano would come through to the jury as credible—in which event, as stated, Louis would be a useful witness for both defendants, not just for Martorano.[6] We conclude

[6] It is true that if counsel regarded Halloran's defense as 70% effective and Martorano's as only, say, 20%, a decision might possibly be made by independent counsel for Martorano to call in

that any difference between the possible impact of Louis' testimony on Martorano and on Halloran is too small and speculative to create a meaningful conflict. In large measure, the factors to be weighed in deciding whether to call Louis as a witness were the same in both cases. They boiled down to the pros and cons of Louis' credibility—if he was credible, both would benefit; if not, he was better left uncalled. This is not a case where certain clear benefits might have been available to one defendant by creating a risk of detriment to the other. *Compare United States* v. *Donahue,* 560 F.2d 1039 (1st Cir. 1977). Here, whatever benefits Louis Pallotta's testimony could confer were likely to accrue to both defendants; whatever risks Pallotta's testimony might create likewise endangered each defendant. We see no reason to infer that separate counsel would have calculated differently the pluses and minuses of Louis' testimony. Coupled with evidence indicating appellant was aware that his choice of joint representation might raise a risk of some conflict, and the absence of any evidence of overreaching by others, *see* note 3 *supra,* we think this showing sufficient to discharge the government's burden of disproving that prejudice resulted from the court's failure to follow *Foster* procedures. As stated at the outset, the government is not required to show the error harmless beyond a reasonable doubt, only that it is more likely than not that no material prejudice occurred as the result of noncompliance with a prophylactic procedure this circuit now requires. This standard has been met.

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even a potentially disastrous witness on the theory that a long shot was better than a clear loss. But if Martorano was in that desperate posture, the district court's findings as to Louis' defects as a witness give us little basis for believing that calling him would have resulted in a different outcome. If on the other hand, as seems more likely, defense counsel viewed Martorano's situation as not without hope, their decision as to whether or not to call Louis would have been guided by essentially the same considerations as in Halloran's case—namely, evaluation of whether or not Louis would likely be a believable witness.

Appellant's other assertions of prejudice need not detain us long. We agree with the panel's conclusion that the decision to have Martorano testify on his own behalf was compelled by the strength of the government's tape-recorded evidence against him. In any event, Martorano's testimony, if anything, hurt Halloran more than it hurt him, since Martorano testified on direct examination both that Halloran had been in prison (corroborating Peter Pallotta on that point) and that Peter Pallotta feared physical violence from Halloran. Introduction of Martorano's criminal record for impeachment purposes merely confirmed Peter Pallotta's testimony on direct suggesting Pallotta feared violence might accompany any nonrepayment of a debt owed to Martorano because Martorano had been convicted as an accessory after the fact to murder. In other respects, Martorano's testimony was exculpatory as to both himself and Halloran. Calling Brian Halloran as a witness plainly was not a viable alternative defense strategy for Martorano. Even had Martorano been represented by separate counsel, he could not have compelled Halloran to forego his fifth amendment right not to testify if Halloran's interests dictated that he remain silent. Martorano could not have been prejudiced by either of these tactical decisions.

III.

In light of its resolution of the case, the original panel did not consider appellant's further argument that the district court erred in denying appellant's motion to recuse. We are inclined to believe that this issue is now effectively moot, since we have not relied to any significant extent on the findings of the district court, and since it would plainly be pointless to remand this case for a new hearing before a different judge. However, lest it be thought that we are ignoring any possible appearance of impropriety in the handling of this matter, we offer the following comments.

Appellant moved to have the district court judge recuse himself pursuant to 28 U.S.C. § 455(a) both because the judge had presided at trial and might be compromised in passing on his own asserted errors, and because certain remarks made by the judge at another trial assertedly indicated he had a personal bias against appellant. As we stated in *United States* v. *Cowden,* 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977), the standard by which such a motion is judged is,

> "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man."

Applying this standard, we think the mere fact that a judge entertains a motion for new trial in a case over which he presided initially does not reasonably call into question his impartiality. Indeed, we have indicated it may often be advantageous to have the original judge continue on a case because of his familiarity with earlier proceedings. *See O'Shea* v. *United States,* 491 F.2d 774, 779 (1st Cir. 1974); *cf. Halliday* v. *United States,* 380 F.2d 270, 272 (1st Cir. 1967) (contrasting hearing on motion for new trial with second trial on facts previously found by court).

Having thoroughly reviewed the record, we see no indication here that the district judge was influenced by personal animus or bias either at the original trial or in considering appellant's collateral attack thereon. Although the court in reviewing the *Foster* issue was inclined to find that appellant had waived his right to separate counsel despite the absence of an on-the-record warning, the court went on to consider carefully whether, assuming a violation of *Foster,* the government had adequately disproved prejudice. As for the remarks the district court made at another

trial intimating that unnamed individuals might cause harm to Peter Pallotta if his usual whereabouts were revealed in open court, we think the court sufficiently disavowed any connection between these remarks and appellant Martorano, at the opening of Martorano's trial, so that no reasonable person could believe they indicated bias against appellant. We thus discern no error in the district court's denial of the motion to recuse.

IV.

In conclusion, we turn briefly to appellant's challenge to our authority to hear this appeal en banc. The power of this court to entertain cases en banc is governed by 28 U.S.C. § 46(c) and by Rule 35 of the Federal Rules of Appellate Procedure. Section 46(c) provides:

> "Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service."

Rule 35(a) provides, in pertinent part:

> "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc."

Appellant argues that because the First Circuit is presently authorized to have four circuit judges, the required majority to order an en banc hearing is three, even though the newly created seat remains unfilled.[7] We disagree.

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[7] Presently there is one vacancy on the circuit. The original three judge panel deciding this case included two regular judges of this circuit plus a third outside judge. Obviously there would have been no occasion for an en banc hearing had the original panel consisted of the three regular judges, nor, as a practical matter, would an en banc have been likely had the two regular judges on the original panel been in agreement.

The statute plainly provides that the required majority must exist among the judges "in regular active service." A judge who is yet to be appointed is not a judge in regular active service. *Cf. United States* v. *American-Foreign Steamship Co.*, 363 U.S. 685, 688 (1960). As we stated in our order of January 10, 1980, a majority of the three regular circuit judges of this court have voted to grant rehearing en banc, and this, in our opinion, is all that the statute requires. *Compare Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1040 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973) (four members of court having eight active members are not empowered to grant rehearing en banc).

Appellant next argues that, assuming the court is comprised at present of only three active judges, we are barred from granting an en banc rehearing because one three-judge panel is not authorized to overrule another. Reliance is placed largely on a provision in a proposed 1941 amendment to the Judicial Code—never enacted—that would have authorized en banc hearings "in a circuit where there are more than three circuit judges." *See Western Pacific Railroad Case*, 345 U.S. 247, 251 (1953). That this proposal was never passed by the Senate, and that instead the very different language of present section 46(c) was enacted, should in itself suffice to rebut appellant's argument. Moreover, the policies behind the en banc procedure, particularly the desirability of providing "that the active circuit judges shall determine the major doctrinal trends of the future for their court," *American-Foreign Steamship*, 363 U.S. at 690, apply as much to this circuit as to any other. When, as often occurs, panels contain one or more judges who are not regular members of the court, the same danger exists here as elsewhere that uniformity and stability of precedent will suffer. We have been directed to no authority indicating that the First Circuit was intended to be excluded from the provisions of section 46(c)

and Rule 35, and we see no reason to refrain from employing the device of en banc rehearing where it is appropriate.

Appellant's other contentions relate primarily to the internal procedures by which the court regulates the grant of en banc hearings. The Supreme Court has stated that such questions are "largely to be left to intramural determination by each of the Courts of Appeals," *American-Foreign Steamship,* 363 U.S. at 688. Rule 35 and First Circuit Rule 15 provide sufficient notice to litigants of the process we follow to satisfy the mandate of the *Western Pacific Railroad Case* that such procedures be "clearly explained." 345 U.S. at 267. *See* Comment, *In Banc Procedures in the United States Courts of Appeals,* 43 Fordham L. Rev. 401, 403 (1974). Appellant's procedural contentions are thus without merit.

We note finally that appellant, pointing to the requirement of Fed. R. App. P. 35(a) that an en banc hearing "ordinarily" be granted only where the issue is of "exceptional importance" or where there is disuniformity in the decisions of the circuit, has questioned whether this case is an appropriate one for en banc consideration. As the word "ordinarily" suggests, the question of when to hold, or when not to hold, an en banc hearing is within the discretion of this court. Even so, our decision to rehear en banc was demonstrably in conformity with the standards of Rule 35. As already indicated, the rehearing serves to maintain uniformity of circuit policy. The panel opinion, in our view, construed *Donahue* to impose a burden of proving lack of prejudice on the government so severe as to approach imposition of a rule of per se prejudice in joint representation cases where *Foster* warnings have not been given. Our opinion today serves to clarify the standard by which the issue of prejudice in *Foster*-type cases should be evaluated, a question we regard as of considerable

importance, in the context of a case like this, and of evident controversy.[8]

Accordingly, for the reasons stated herein, and, insofar as we have specifically adopted them, the reasons stated in the panel opinion, the decision of the district court is affirmed.

BOWNES, *Circuit Judge* (dissenting). I concur in parts I and III of the opinion, but respectfully dissent as to parts II and IV.

My brethren draw different conclusions than I from the same facts. I do not agree "that to the extent Louis Pallotta's testimony would have helped Martorano, it would also in virtually equal measure have helped Halloran." Majority Opinion at 8. My view of the record is that Louis Pallotta could not have given any testomony that would have directly benefited Halloran because he had no personal knowledge concerning Halloran's alleged involvement in the extortion scheme. It seems clear to me that one of the reasons Louis Pallotta was not called, as Attorney Weinberg admitted at the hearing, was because it was feared that on cross-examination he would make damaging statements as to Halloran's reputation and character. In my opinion, the standard annunciated by my brother Campbell in *United States* v. *Donahue*, 560 F.2d 1039, 1045 (1st Cir. 1977), was met. An alternative strategy plainly existed which involved "some potential for conflict of interest."

[8] Finally, we note that appellant moved to strike the government's supplemental brief on rehearing en banc as not authorized by the Federal Rules or by specific permission of the court. In the alternative, appellant requested permission to file a brief of his own. Such permission having been granted, and appellant having filed his brief, we see no possible harm to appellant. His motion to strike is denied.

Id. Unlike my brethren, I "cannot say for sure that the potential conflict did not influence the choices made by those representing both defendants." *Id.*

While I agree with my brethren that a majority of the three regular circuit judges determines whether there shall be an in banc hearing, I do not agree that the requirements of FRAP 35(a) were met in this case. There is no disagreement between us as to the controlling cases. The only difference is whether the *Donahue* standard applies. This is purely a judgment call. All that the in banc hearing has produced is a different result. It has not secured or maintained uniformity of decisions in this area, something that is obviously impossible under our case-by-case approach to the problem of dual representation. And while the question is obviously of exceptional importance to Martorano, it does not rise to anywhere near that level as far as circuit precedent is concerned. No new gloss has been put on *Foster* or *Donahue*. The case is just another illustration that reasonable men of essentially the same background, training and experience can differ in their assessment of the facts.

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UNITED STATES of America, Appellee,
v.
James MARTORANO,
Defendant-Appellant.

No. 78-1445.

United States Court of Appeals,
First Circuit.

Argued March 15, 1979.

Decided Dec. 6, 1979.

Rehearing En Banc Granted and Opinion Vacated Jan. 10, 1980.

After defendant was convicted of extortion, his motion for new trial was denied by the United States District Court for the District of Massachusetts, Andrew A. Caffrey, Chief Judge, 457 F.Supp. 868, and he appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) in view of testimony of the particular defendant as well as testimony of his attorneys that he never did discuss contents of letters with his attorneys, which concerned his right to separate counsel and waiver thereof, the district court correctly proceeded to consider the issue of prejudice, and correctly placed burden of proof thereon on the Government; (2) where particular defendant thought it would be very effective to have the Government's chief witness contradicted by the latter's own brother and thus the particular defendant continually urged defense counsel to call such witness' brother but he was not called because defense counsel feared the prosecution would on cross-examination of such witness' brother elicit testimony damaging to the codefendant in the joint trial, calling the brother of such chief government witness was alternate strategy which, whatever its ultimate merit, plainly existed, and serve[d], as between the joint defendants, [a] potential for conflict of interest, and [if] it would be found that there was prej-

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appointed for him, no interrogation or questioning shall take place until an attorney is appointed for him if he so desires;

(d) That he may exercise any of the aforesaid rights any time during the questioning or interrogation."

udice from joint representation; and (3) the fact that the alternate strategy to which defense counsel could have resorted had not defendants been jointly represented was not without risk did not preclude a finding that it was reasonable strategy to pursue and that the particular defendant was prejudiced by being jointly represented.

Reversed and remanded.

Coffin, Chief Judge, dissented and filed opinion.

1. Criminal Law ⇐641.5

Sixth Amendment right to separate counsel is waivable in recognition of fact that occasionally joint representation can be appropriate or even advantageous to multiple defendants, but courts bear special responsibility in evaluating criminal defendant's purported waiver of Sixth Amendment right to separate counsel. U.S.C.A. Const. Amend. 6.

2. Criminal Law ⇐641.5

District court has duty to comment as early in litigation as practical on some of risks indigenous to joint representation and to inquire diligently of jointly represented defendants whether they have discussed these risks with counsel and whether they are aware of rights to separate counsel and, if indigent, to court-appointed counsel. U.S.C.A.Const. Amend. 6.

3. Courts ⇐85(3)

Expansion of supervisory rule of Court of Appeals, under which district court has duty of inquiry to require fuller warning than previously, including more detailed explanation of risks involved in joint representations, does not apply retroactively. U.S.C.A.Const. Amend. 6; Fed.Rules Cr. Proc. Rule 44(c), 18 U.S.C.A.

4. Criminal Law ⇐641.5

Rarely, if ever, will Court of Appeals consider adequate a waiver of right to separate representation when trial court has not met its duty of inquiry as outlined in judicial opinions. U.S.C.A.Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

5. Criminal Law ⇐641.5

Purpose of rule, promulgated by judicial opinion, describing district court's duty of inquiry to determine whether waiver of right to separate representation is voluntary and knowing is to insure that there is on-the-record exchange between trial court and defendant from which it can be readily inferred that waiver was voluntary and knowing, and in absence of such exchange, evidence of valid waiver will probably never be so unambiguous that prowaiver finding would be affirmed, in view of every reasonable presumption against finding of waiver. U.S.C.A.Const. Amend. 6; Fed.Rules Cr. Proc. Rule 44(c), 18 U.S.C.A.

6. Criminal Law ⇐641.5

In view of testimony of particular defendant as well as testimony of his attorneys that he never did discuss contents of letters with his attorneys, which concerned his right to separate counsel and waiver thereof, district court correctly proceeded to consider issue of prejudice, and correctly placed burden of proof thereof on the Government. U.S.C.A.Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

7. Criminal Law ⇐1035(7)

Issue whether prejudice should be found as matter of course where jointly represented defendant was not shown to have voluntarily and knowingly waived his right to separate counsel could not be raised for first time on appeal where it did not appear that failure to consider issue would result in manifest injustice. U.S.C.A.Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

8. Criminal Law ⇐641.5, 997.15(5)

Burden on government with respect to issue of whether a defendant was prejudiced by joint representation in absence of showing of record that right was voluntarily and knowingly waived is to demonstrate from record that prejudice to defendant was improbable, if issue is raised by way of direct appeal from conviction, though if issue arises in context of motion to vacate or correct sentence, government will bear burden of establishing unlikelihood of prejudice

by preponderance of evidence. U.S.C.A. Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.; 28 U.S.C.A. § 2255.

9. Criminal Law ⇐641.5

Where particular defendant thought it would be very effective to have Government's chief witness contradicted by latter's own brother and thus particular defendant continually urged defense counsel to call such witness' brother but he was not called because defense counsel feared the prosecution would on cross-examination of such witness' brother elicit testimony damaging to codefendant in joint trial, calling brother of such chief government witness was alternate strategy which, whatever its ultimate merit, plainly existed, and same involved, as between the joint defendants, some potential for conflict of interest, and thus it would be found that there was prejudice from joint representation. U.S.C.A.Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

10. Criminal Law ⇐641.5

That alternate strategy to which defense counsel could have resorted had not defendants been jointly represented was not without risk did not preclude finding that it was reasonable strategy to pursue and that particular defendant was prejudiced by being jointly represented. U.S.C.A.Const. Amend. 6; Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

Richard J. Vita, Boston, Mass., for defendant-appellant.

Wade Livingston, Atty., Dept. of Justice, Washington, D. C., with whom Edward F. Harrington, U. S. Atty., Boston, Mass., and Joseph S. Davies, Atty., Dept. of Justice, Washington, D. C., were on brief, for appellee.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, PETTINE, District Judge.*

BOWNES, Circuit Judge.

In this appeal from the denial of his motion for a new trial, appellant seeks reversal of his extortion conviction on grounds of ineffective assistance of counsel due to joint representation.

Appellant and Brian Halloran were tried together on four counts of extortion in June 1976. The jury acquitted Halloran, but found appellant guilty on all counts. We affirmed appellant's conviction and denied his petition for rehearing. *United States v. Martorano*, 557 F.2d 1 (1st Cir.), *rehearing denied*, # 76-1372 (1st Cir. May 23, 1977) (unpub.) *and* 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978).

In February 1978, appellant moved for a new trial on grounds of newly discovered evidence. Because final judgment had been entered more than one year before the motion was filed, a motion for new trial on any other grounds would have been untimely. See Fed.R.Crim.P. 33. Appellant's "newly discovered evidence" was that he had been prejudiced at trial because he and Halloran had been jointly represented by members of the same law firm. This "evidence" was said to be "newly discovered" because appellant did not learn of the prejudice until he obtained new (his present) counsel, which was after his appeal and petition for rehearing had been decided.

The district court held an evidentiary hearing on appellant's motion for a new trial, at which appellant and all counsel involved in his trial testified. In its opinion and order on the motion, the court ruled, as a threshold matter, that it was treating the motion as one to vacate a sentence under 28 U.S.C. § 2255, on the ground that the issue of ineffective assistance due to joint representation does not constitute "newly discovered evidence" within the meaning of Rule 33. As to the merits of the motion, the court found that, prior to his trial, appellant had knowingly waived his sixth amendment right to separate counsel. Because, however, the trial judge had not complied with *United States v. Foster*, 469 F.2d 1, 4-5 (1st

* Of the District of Rhode Island, sitting by designation.

Cir. 1972), by personally addressing appellant concerning his waiver, the district court, in ruling on the motion for a new trial, believed it was necessary to reach the issue whether appellant had been prejudiced by his joint representation and to place the burden of proof on this issue on the government. After reviewing the evidence bearing on the issue of prejudice, the district court ruled that appellant had not been harmed by the fact he had shared trial counsel with Halloran. Accordingly, the court denied appellant's motion for a new trial. *United States v. Martorano*, 457 F.Supp. 803, 810 (D.Mass.1978). This timely appeal followed.

WAIVER

Appellee argues that since the district court's finding of a knowing and voluntary waiver is supported by the record, we should affirm the denial of the new-trial motion on that ground and not reach the issue of prejudice. Appellant contends that the district court's finding of waiver is erroneous and that, in any event, the issue of prejudice must be reached because the trial judge failed to comply with its duty of inquiry under *Foster*. We agree with the latter portion of appellant's argument.

[1-3] The right to separate counsel, guaranteed by the sixth amendment, is waivable in recognition of the fact that occasionally joint representation can be appropriate or even advantageous to multiple defendants. *United States v. Waldman*, 579 F.2d 649, 651 (1st Cir. 1978). An understanding, or even an awareness, of the risks inherent in joint representation, however, is not a part of the basic knowledge of the average layperson. For this reason, and because waiver of any constitutional right is a serious matter, courts bear a special responsibility in evaluating a criminal defendant's purported waiver of his sixth amendment right to separate counsel. *Id.* In view of this responsibility, in *Foster* we devised a rule under our supervisory powers for district courts to adhere to in evaluating such waivers. The district court's "duty of inquiry" under *Foster* requires a trial court to comment, "as early in the litigation as practicable," on some of the risks indigenous to joint representation and to "inquire diligently" of jointly-represented defendants whether they have discussed these risks with counsel and whether they are aware of their rights to separate (and, if indigent, court-appointed) counsel.[1] 469 F.2d at 5.

It is undisputed that the trial court failed to address appellant about the waiver which appellant filed with the court. The trial court first learned that appellant and Halloran were being represented by two members (Oteri and Weinberg) of the same firm at Halloran's arraignment, which was held several days after appellant's. Upon learning of the joint representation, the magistrate, in recognition of his duty under *Foster*, questioned Halloran about possible conflicts of interest. He then instructed attorney Weinberg, who had accompanied Halloran, to inform Halloran and appellant about their right to separate counsel and, if either defendant wished to waive that right, to have him send a letter of waiver to the court. Appellant was not present at Halloran's arraignment and at no other time during the course of the trial did the magistrate or the trial judge speak to him about his joint representation.

The district court found, however, upon the basis of the evidence presented at the hearing on the motion for a new trial, that appellant did in fact voluntarily and know-

1. Since *Foster*, we have expanded the district court's duty of inquiry to require a fuller warning which includes a more detailed explanation of the risks involved in joint representation. *United States v. Donahue*, 560 F.2d 1039, 1043 4 (1st Cir. 1977). This expansion of our supervisory rule does not, however, apply retroactively. *Waldman*, 579 F.2d at 652, so it is inapplicable to the present case in which trial occurred in 1976.

As of August 1, 1979, Rule 44(c), Fed.R.Crim.P., requires district courts to advise jointly-represented defendants about their right to separate representation. The Rule, however, does not require as detailed an inquiry as our supervisory rule which, of course, is controlling in this circuit.

ingly waive his right to separate counsel before he was tried. The evidence upon which the court's finding was based is the following. Shortly after Halloran's arraignment, appellant was called to the office of Oteri and Weinberg. There, Weinberg gave him two letters which Weinberg had drafted, one purporting to be from Oteri to Martorano (advising Martorano of the magistrate's instructions to counsel) and the other from Martorano to the magistrate (stating that appellant was aware of his right to separate counsel and of the risks of joint representation, but that he still wished to retain his present counsel). Appellant was given a few minutes to read these letters, he then signed them, and later Weinberg had the letter to the magistrate filed with the court.

Conflicting evidence was presented at the hearing concerning whether Weinberg ever explained the meaning of the letters to appellant. The district court found that Weinberg did discuss the contents of the letters with appellant and ruled, on the basis of the letters and this discussion, that appellant's letter to the magistrate constituted a knowing and voluntary waiver of appellant's right to conflict-free counsel. Appellee argues that this finding is supported by the record, so there is no need for us to reach the issue of prejudice even though the trial court failed to comply with *Foster*.

[4, 5] The short answer to appellee's argument is that rarely, if ever, will we consider a waiver adequate when the trial court has not met its duty of inquiry under *Foster* (and where applicable, *Donahue*, see note 1 *infra*), *United States v. Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977), *cert. denied* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60 (1978) (dictum); *cf. Waldman, supra*, 579 F.2d at 651–53 & n.6, and this case does not constitute such a rarity. The purpose of the *Foster* rule is to ensure that there is an on-the-record exchange between the trial court and defendant from which it can readily be inferred that the waiver was voluntary and knowing. In the absence of such an exchange, it is doubtful that the evidence of a valid waiver would ever be so unambiguous that, "indulg[ing] [in] every reasonable presumption" against a finding of waiver, *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we could still affirm a district court's pro-waiver finding.

[6] Here, the evidence that appellant's waiver was voluntary and knowing was certainly not unambiguous. The letters which Martorano signed stated that he had been informed of the risks of sharing trial counsel and of his right to separate counsel. These letters, however, do not constitute strong evidence that he understood the dangers involved because they only stated that appellant was "aware" of the "risks" and did not describe any risks.[2] Appellant testi-

2. The letters were as follows:

Dear Jim:

Pursuant to general instructions issued by the Magistrate Willie Davis on September 29, 1975, I advise you as follows pursuant to the rules articulated by the United States Court of Appeals for the First Circuit in a case styled *United States v. Foster*, 469 F.2d 1. As you know, I represent both yourself and Brian Halloran in the above-captioned matter. The *Foster* case held that there were dangers to criminal defendants like yourselves inherent in any joint representation. The Court asked me to advise you of the risks involved in joint representation so that you would be aware of these risks and, would if you wished, retain separate counsel.

I enclose for your consideration the following letter which I have authored on your behalf which, if it conforms to your desires, may be signed by you and forwarded back to me for the purposes of sending to the Court to satisfy its burden under the *Foster* case of ascertaining whether or not you are conscious and aware of the fact that you may retain separate counsel and may be prejudiced by joint representation.

Sincerely,
Joseph S. Oteri

Dear Magistrate Davis:

Pursuant to your instructions of September 29, 1975, I state to you that I am aware of the dangers which exist to criminal defendants and which are inherent in joint representation. I have discussed these risks with my attorney, Joseph S. Oteri, and I understand that I may retain separate counsel or if I qualify as an indigent I may have such coun-

fied, as did attorneys Oteri and Weinberg, that he never did discuss the contents of the letters with his attorneys. Counsel believed that there were no conflicts of interest between Halloran and appellant. Thus, they viewed the preparation of the letters as a mere technicality to ensure, in view of the magistrate's instructions, their continued representation of appellant and Halloran. Appellant testified that, given this attitude of counsel towards the letters, he felt no need to satisfy himself as to their meaning before signing them. Due to this conflicting evidence concerning the validity of appellant's waiver, the district court was correct in proceeding to consider the issue of prejudice and in placing the burden of proof on appellee.[3]

PREJUDICE

[7] Citing to *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), appellant argues that, when a jointly-represented defendant has not voluntarily and knowingly waived his right to separate counsel, we should find prejudice as a matter of course. This issue was not raised below. Therefore, only if a failure to consider the issue would result in manifest injustice, do we need to reach it. *See, e. g., United States v. Emery*, 541 F.2d 887, 889 n.3 (1st Cir. 1976).

We declined to adopt the per se rule appellant desires in *Foster*, 469 F.2d at 5, and do not read *Holloway* as requiring us to reconsider that decision.[4] It is true that this is the second post-*Foster* trial of which we are aware in which the trial court failed to adhere to our supervisory rule concerning waiver, thereby requiring us to analyze a lengthy trial record and engage in "the impossible task of speculating about what might have happened" had appellant had his own lawyer.[5] *Lollar v. United States*, 126 U.S.App.D.C. 200, 205, 376 F.2d 242, 248 (D.C.Cir.1967) (C. J. Bazelon, dissenting). Both trials occurred, however, in 1976 before our opinion in *Donahue* in which we stressed how important we viewed compliance with the rule on waiver to be. Thus, it is not apparent at this time that a per se rule is necessary to encourage such compliance. *Compare United States v. Scott*, 583 F.2d 362, 364 (7th Cir. 1978) (en banc as to adoption of per se rule). In sum, we see no reason to reconsider in this appeal whether a per se rule should be adopted.

[8] In *Foster* we ruled that where a satisfactory inquiry into waiver does not appear on the trial record, the government bears the burden of persuasion on the issue of prejudice. The government must "dem-

> sel appointed for me by the Court. I am mindful of the risks and dangers of joint representation and I desire for Mr. Oteri to continue to represent me despite these risks and despite my knowledge that his office also represents a co-defendant in the above-captioned matter.
>
> Sincerely,
>
> James Martorano

3. Defense counsels' failure to explain the risks of joint representation fell below the standards established for members of the Massachusetts bar by the Code of Professional Responsibility. *Donahue, supra*, 560 F.2d at 1043 n.2 ("in those few situations where joint representation may be justified, . . . 'a lawyer should explain *fully* to each client the implications of the common representation and should accept or continue employment only if the client consents.'" (emphasis added). Furthermore, these same attorneys were trial defense counsel in *Donahue*, another case which required a new trial because of prejudice arising from joint representation. We might have referred these matters to a disciplinary committee except that both appellant's and Donahue's trials occurred at about the same time and before our decision in *Donahue* issued. At the post-Donahue hearing on appellant's motion for a new trial, both defense counsel testified that in light of *Donahue* they no longer represent more than one defendant at a trial.

4. In *Holloway* the Court held that, when a trial court fails to give due consideration to a court-appointed defense counsel's contention that the defendants he is jointly-representing have conflicting interests, reversal of the defendants' convictions is automatically required. 435 U.S. at 488, 98 S.Ct. 1173.

5. The first trial was *Donahue*.

onstrate from the record that prejudice to the defendant was improbable" if the issue is raised by way of a direct appeal from a conviction. "If the issue arises in the context of a [28 U.S.C.] § 2255 motion, the government will bear the burden of establishing the unlikelihood of prejudice by a preponderance of the evidence." 469 F.2d at 5.

Appellee contends that the district court properly treated appellant's motion for a new trial as a § 2255 motion. Thus, appellee argues, it need only prove "the unlikelihood of prejudice by a preponderance of the evidence." Appellant argues that the district court erred in treating its motion as a motion to vacate sentence under § 2255. Therefore, the government must prove that prejudice was "improbable."

The issue whether ineffective assistance can ever properly be raised in a motion for new trial on grounds of newly discovered evidence is an open question in this circuit, *United States v. Carlson*, 561 F.2d 105, 109 (1st Cir.), *cert. denied* 434 U.S. 973, 98 S.Ct. 529, 54 L.Ed.2d 464 (1977); *United States v. McCambridge*, 551 F.2d 865, 873 (1st Cir. 1977) which will not be resolved here, for whichever standard we apply our decision on the issue of prejudice remains the same.

Appellant points to three of defense counsel's tactical decisions as indicating that his interests, in terms of which defense strategy to pursue, conflicted with Halloran's and that defense counsel consistently chose the tactics which benefitted Halloran. Defense counsels' reasons for so proceeding were, according to appellant, their theory of defense that, if Halloran was acquitted, appellant's acquittal would automatically follow and their preference for Halloran due to their longer association with him.

The three decisions which allegedly benefitted Halloran at appellant's expense were defense counsel's insistence that appellant testify, their decision that Halloran not testify, and their refusal to call Louis Pallotta. Counsels' decision not to call Pallotta constitutes sufficient evidence of prejudice to require a new trial. Hence, we need not consider whether counsels' other tactics also resulted in prejudice to appellant.

[9] Appellant contends that, if Louis Pallotta had testified, he would have corroborated appellant's version of the loan transaction and rebutted the version of the government's chief witness, Louis' brother, Peter Pallotta. Appellant thought it would be very effective to have Peter contradicted by his own brother. For these reasons, appellant continually urged defense counsel to call Louis. Louis was not called, however, because defense counsel, according to appellant, feared that the prosecution would on cross-examination of Louis elicit testimony damaging to Halloran. Appellee argues that even a defense counsel loyal only to appellant would not have called Louis because his credibility was so open to attack.

In determining whether the decision not to call Louis indicates that appellant was prejudiced by his joint representation we consider whether, in terms of appellant's defense, calling Louis was "an alternate strategy [which]—whatever its ultimate merit—plainly existed" and whether it "involved, as between the joint defendants, some potential for conflict of interest . . . ." *Donahue*, 560 F.2d at 1045.

On the basis of our review of the trial record we find that calling Louis was "an alternate strategy [which]—whatever its ultimate merit—plainly existed." In other words, an attorney representing only appellant might reasonably have pursued this strategy. After the government rested its case-in-chief, any competent defense counsel would have realized that for appellant to have any chance of being acquitted, he had to put on some kind of defense. The victim of the alleged extortion scheme, Peter Pallotta, has testified in detail about how appellant had lent him $2000 at extortionate rates, how, after Peter defaulted, appellant had threatened him with harm, and how appellant had sent Halloran to rob Peter's nightclub to recover overdue interest payments. It is true that Peter's credibility was vigorously attacked on cross-examina-

tion[6] but the government's case against appellant did not rest on Peter's testimony alone. The government also admitted a taped telephone conversation between appellant and Peter in which appellant's statements practically constituted admissions of guilt.[7] Therefore, as appellant's trial counsel recognized, they could not rest without putting in some kind of defense.

Calling Louis Pallotta, however, was not defense counsels' only choice in terms of putting on a defense for appellant. Counsel had reason to believe that appellant would make a good witness. One-half of his criminal record was already in evidence and the other half was relatively minor, so the fact that appellant's record would probably be revealed to the jury if he testified was not a major drawback to calling appellant. Counsel believed that appellant was charming, articulate, intelligent, and had the appearance of a business man. They knew that appellant was a family man, had been steadily employed for the last few years, and had recently earned a B.S. degree by going to Boston College nights. Furthermore, appellant was the only person who could attempt to explain away his statements on the tape because the recorded conversation admitted in evidence had been solely between Peter and himself. Therefore, defense counsel would have been foolish not to call, and in fact did call, appellant for purposes of presenting a defense on his own behalf.

Since calling appellant to testify was a reasonable strategy to pursue, defense counsel were not faced with a situation where calling Louis was realistically their only choice in terms of presenting a defense for appellant. Still, we cannot say on the basis of the record before us that it would have been unreasonable for an attorney representing only appellant to have called Louis as well. Louis was the only other person present besides Peter and appellant when the loan was negotiated. If he had been called, he would have corroborated appellant's version of these negotiations and rebutted Peter's. Appellant had testified that the loan had been made to his good friend, Louis, not to Peter, whom he met for the first time that day, that Peter accompanied Louis because Louis thought appellant might be able to give Peter some advice on an unrelated matter, and that the loan to Louis was interest-free and without definite terms as to repayment. Louis, according to appellant, repaid the loan within a few weeks, before the date on which appellant allegedly had Halloran rob Peter's club. If Louis had testified, he would have corroborated this version of the loan transaction, rather than Peter's. Although the government's case against appellant was strong, this corroboration of appellant's tes-

6. On direct examination Peter informed the jury about his lengthy criminal record. On cross, testimony was elicited from Peter from which it could be inferred that he had fabricated his allegations against Halloran and appellant in order to obtain government protection. According to Peter's testimony, he was in default on loans from other alleged loan sharks, an arrest warrant for him was outstanding in Massachusetts for failure to pay child support, and he had committed numerous parole violations which, if discovered by the proper authorities, would result in a minimum jail term of seven years. Other portions of Peter's testimony on cross indicated that he thought all of these problems would be "cured" if he assisted the government in preparing a case against Halloran and appellant.

7. The telephone conversation initiated by Peter and recorded with his permission was as follows:

Peter: Jimmy [appellant], I ain't got any money. I'm trying to put something together.

Appellant: Oh, why don't you stop by and see me.

Peter: I'm afraid to go down there, you know that.

Appellant: You don't have to be afraid to come down to see me.

Peter: I'm afraid I'll wind up gettin' slapped in the face.

Appellant: Nothin's gonna happen.

Peter: Huh?

Appellant: Don't talk like that on the phone.

Peter: Oh, all right. All right, can I meet you somewhere else?

Appellant: You can come any time. What do you think I'm gonna do something 'round my own place? Be kind of stupid wouldn't it? Ah, first chance you get drop by and see me, all right?

Peter: Okay. All right, Jim.

timony might have made the difference in the jury's decision as to whether appellant was guilty "beyond a reasonable doubt."

[10] It is true, as appellee argues, that calling Louis was a risk because the prosecution was aware that Louis had a history of mental health problems and had made a prior inconsistent statement to the F.B.I. Thus, defense counsel were properly concerned that Louis' credibility might have been destroyed during cross examination, which could then have led to a weakening of appellant's credibility in the eyes of the jury. Still, there is no evidence in the record indicating that Louis could not have overcome his credibility problems. For all we know his mental health problems might have had no bearing on his ability to tell the truth or to give a reliable account of the loan transaction. Moreover, there is no evidence indicating that Louis could not have persuaded the jurors that his prior statement to the F.B.I. was false and that they should believe his testimony at trial. It is possible that Louis lied to the F.B.I. on impulse to protect his brother (who had already agreed to "cooperate" with the F.B.I. in building a case against appellant), but then later decided to tell the truth even though he would be contradicting his brother by doing so. The question of credibility is always an iffy one. The only way appellant's testimony about the terms of the loan could have been corroborated was through Louis. We have no reason to doubt that calling him would have been an acceptable risk. In sum, on the basis of the record before us, we cannot say with any assurance that an attorney representing only appellant would not reasonably have called Louis to strengthen the defense. Thus, calling Louis was "an alternate strategy [which]—whatever its ultimate merit—plainly existed" in terms of making a case for appellant.

We next consider whether, as between Halloran and appellant, there was a potential for conflict in calling Louis. In other words, since calling Louis was not an unreasonable strategy in terms of appellant's defense, we consider whether it might have been an unwise tactic in terms of Halloran's defense.

It is undisputed that Louis could not have given any testimony that would have directly benefitted Halloran because Louis had no personal knowledge concerning Halloran's alleged involvement in the extortion scheme. Moreover, there is evidence that calling Louis might have harmed Halloran. At the hearing on appellant's motion for a new trial appellant testified that defense counsel told him they were not going to call Louis because they feared that on cross examination of Louis the prosecution would elicit damaging evidence with regard to Halloran's reputation and character. Attorney Weinberg admitted that this was one reason why Louis was not called. A review of the trial record corroborates the testimony at this hearing that calling Louis might have harmed Halloran.

During the government's case-in-chief at appellant's trial, Peter Pallotta had testified that he was afraid of Halloran because he knew Halloran was "a loan shark, collector, and enforcer and a madman" and "if you didn't . . . pay [him] you would get a beating or maybe worse." However, because Peter had been subjected to vigorous cross examination, see note 6 *supra*, his testimony alone did not constitute overwhelming evidence against Halloran. Furthermore, the government had not been successful in admitting any other evidence (e. g., a taped conversation) against Halloran. Therefore, it is probable that a major concern of any attorney representing Halloran would have been to prevent any damaging evidence from coming in against Halloran during the presentation of the defense. In view of Louis' expected testimony on cross, corroborating Peter's testimony about Halloran's reputation and character, a defense attorney representing Halloran would not only not have called Louis, but would have been concerned to hear that he would be called by a codefendant. Thus, calling Louis would have involved, "as between the joint defendants, [a] potential for conflict of interest." *Donahue*, 560 F.2d at 1045. Given this fact and the fact that calling Louis was "an alternate strategy [which]—whatever its ultimate merit—plainly existed" for appellant, *id.*, appellee has not established that prejudice to appellant arising from his

joint representation was improbable. Moreover, there is enough evidence of a conflict here so we also cannot say that appellee has proven the unlikelihood of prejudice by a preponderance of the evidence. Hence, we reverse appellant's conviction and remand for a new trial.

Having found that appellant is entitled to a new trial we need not reach the issue whether the district court erred in refusing to recuse itself from considering appellant's motion.

Reversed and remanded.

COFFIN, Chief Judge (dissenting).

While I am uncomfortable with the court's holding that appellant, a college graduate and sophisticated businessman, did not waive his right to conflict-free counsel, I can see the value of generally requiring an on-the-record exchange between court and defendant. I can therefore accept the court's holding on waiver.

My problem materializes when I consider the question of prejudice. The court's opinion seizes on the decision not to call Louis Pallotta as sufficient evidence of prejudice to require a new trial. It notes appellant's arguments that Pallotta would have corroborated appellant's version of the loan transaction, rebutting his brother Peter, which would have been helpful; and that defense counsel refused to call Pallotta because cross-examination would elicit testimony damaging to Halloran.

The standard adopted by the court's opinion is, to quote from *United States v. Donahue*, 560 F.2d 1039, 1045 (1st Cir. 1977), whether the action (i. e., calling Louis Pallotta as a witness) was "an alternate strategy [which]—whatever its ultimate merit—plainly existed." The court's opinion obviously assumed this standard was met.

The trial court, however, made these findings—that Louis Pallotta would be a liability to both appellant and Halloran; that Pallotta had made a prior statement to the FBI flatly contradicting any exculpatory testimony he might have given for the defense; that he had a lengthy psychiatric history including diagnosis as a paranoid schizophrenic; that Halloran ran less risk of embarrassment from Pallotta's testifying, because of prior inconsistencies, than did appellant; that after a trial run at testifying Martorano's lawyer thought Pallotta to be a "terrible witness". The court concluded that "there is no reason in the world to speculate that separate counsel would have analyzed the potential impact of Louis Pallotta's testimony any differently" than did appellant's counsel.

These observations I think it important to note, are not evaluations of strategy, where our hindsight judgments might well be as valid as those of the trial court. They are the clearest indicia of the vulnerability of Pallotta's credibility. I see absolutely no basis for disagreement with the trial judge and cannot see how the court can say: "We have no reason to doubt that calling him [Pallotta] would have been an acceptable risk."

In short, I would hold that the government has more than adequately sustained its burden of demonstrating that "prejudice to the defendant was improbable". *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972). It seems to me that the court, in holding that calling Louis Pallotta was a strategy that "plainly existed", may well be taking too literally the caveat in *Donahue*, "whatever its ultimate merit", and therefore is confusing the ability to articulate a strategy with a realistic chance to pursue one. Such a reading, of course, would entirely eviscerate the standard of probability of prejudice established in *Foster*. I fear that the court's approach in this case comes too close to adopting a per se rule of prejudice in all cases where conflict is not waived.

ORDER OF COURT

A majority of the judges in regular active service on this Court having voted for a rehearing en banc,

The opinion of the Court filed on December 6, 1979, is withdrawn and the judgment entered on said date is vacated;

The petition for release on bail is denied; and

This case is assigned for rehearing en banc on Friday, February 1, 1980.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 78-1445

UNITED STATES OF AMERICA,
APPELLEE,

V.

JAMES MARTORANO
DEFENDANT, APPELLANT

Before Coffin, Chief Judge,
Campbell and Bownes, Circuit Judges,

MEMORANDUM AND ORDER
Entered June 9, 1980

The petition for rehearing is denied. Cuyler v. Sullivan, 48 U.S.L.W. 4517 (May 12, 1980), is not helpful to appellant. The Court there held that "the possibility of conflict is insufficient to impugn a criminal conviction," and that, where a defendant makes no objection to joint representation at trial, "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." 48 U.S.L.W. at 4521. During the hearing held by the district court, appellant had ample opportunity to seek to demonstrate the alleged adverse effects of his being represented jointly, and the district court made comprehensive findings in which it determined that

no such prejudice had ensued. Those findings are not clearly erroneous. Moreover, this court's independent analysis of the record, based on a standard in some respects more favorable to the defendant than that eninciated by the Supreme Court in Cuyler, reached the conclusion, by a majority of the Court, that there were no adverse effects as a result of joint representation. We find no merit to appellant's remaining contentions in the petition for rehearing.

Petition denied.

By the Court:

Dana H. Gallup

Clerk

APPENDIX "C"

UNITED STATES CONSTITUTION AMENDMENT 6:

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §46:

Assignment of judges; divisions; hearings; quorum.

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

§ 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a mjaority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(dO A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

18 U.S.C. §§891-896

§ 891. Definitions and rules of construction

For the purposes of this chapter [18 USCS §§ 891 et seq.]:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

§ 893. Financing extortionate extensions of credit

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) [18 USCS § 892(b)(1)] or the circumstances described in section 892(b)(2) [18 USCS § 892(b)(2)], and direct evidence of the actual belief of the debtor as

to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

§ 895. [Repealed]

§ 896. Effect on State laws

This chapter [18 USCS §§ 891 et seq.] does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter [18 USCS §§ 891 et seq.]. No law of any State which would be valid in the absence of this chapter [18 USCS §§ 891 et seq.] may be held invalid or inapplicable by virtue of the existence of this chapter [18 USCS §§ 891 et seq.], and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter [18 USCS §§ 891 et seq.] of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter [18 USCS §§ 891 et seq.].